

Update: Criminal Procedure Monograph 8—Felony Sentencing

Part II—Scoring the Statutory Sentencing Guidelines

8.6 Scoring an Offender's Offense Variables (OVs)

K. OV 10—Exploitation of a Vulnerable Victim

2. Case Law Under the Statutory Guidelines

Vulnerability—age of the victim.

Insert the following text after the partial paragraph at the top of page 62:

A five-year age difference between a defendant and a complainant may justify a score of ten points for OV 10. *People v Johnson*, ___ Mich ___, ___ (2006). In *Johnson*, the Michigan Supreme Court stated:

“We also agree that the trial court did not err in scoring OV 10 at ten points. . . . As the Court of Appeals explained, ‘[w]here complainant was fifteen years old and defendant was twenty, the court could determine that defendant exploited the victim’s youth in committing the sexual assault [citation omitted].’” *Johnson*, *supra* at ___.

8.6 Scoring an Offender's Offense Variables (OVs)

L. OV 11—Criminal Sexual Penetration

2. Case Law Under the Statutory Guidelines

Insert the following text after the November 2005 update to page 66:

**People v Cox*,
268 Mich App
440 (2005),
discussed in the
November 2005
update to page
66.

In *People v Johnson*, ___ Mich ___, ___ (2006), the Michigan Supreme Court further defined OV 11 as applied to cases in which a defendant is convicted of more than one count of first-degree criminal sexual conduct (CSC-1). In *Johnson*, the trial court scored OV 11 at 25 points because the defendant had twice penetrated the victim. Like the defendant in *Cox*,* the defendant in *Johnson* was charged with and convicted of CSC-1 for each penetration. In *Cox*, 25 points were appropriately scored because the two penetrations/convictions arose from the same sentencing offense. In contrast to *Cox*, however, neither of the penetrations in *Johnson* arose from the same sentencing offense. In *Johnson*, the penetrations occurred on different dates. In the absence of any evidence that the defendant's conduct on one date arose from his conduct on the other date, the two penetrations did not arise from either of the two CSC-1 offenses for which the defendant was sentenced. Therefore, because the two penetrations in *Johnson* did not arise from the sentencing offense, the trial court erred in scoring OV 11 at 25 points instead of 0 points.

8.6 Scoring an Offender's Offense Variables (OVs)

N. OV 13—Continuing Pattern of Criminal Behavior

2. Case Law Under the Statutory Guidelines

In *People v Francisco*, ___ Mich ___ (2006), the Michigan Supreme Court ruled that the issue involving OV 13 was wrongly decided in *People v McDaniel*, 256 Mich App 165 (2003). Therefore, on page 70, delete the first paragraph in this sub-subsection and insert the following text:

In *People v Francisco*, ___ Mich ___, ___ (2006), the Michigan Supreme Court ruled that the five-year period to which OV 13 refers must include the sentencing offense. OV 13 assesses points when a sentencing offense is part of a pattern of felonious activity. According to MCL 777.43(2)(a), a pattern consists of three or more crimes committed in a five-year period “including the sentencing offense.” In *Francisco*, the trial court scored OV 13 at 25 points for the defendant’s three previous felonies that occurred in 1986, even though the offense for which the defendant was being sentenced occurred in 2003.

Based on the plain language of MCL 777.43, the *Francisco* Court explained:

“[I]n order for the sentencing offense to constitute a part of the pattern, it must be encompassed by the same five-year period as the other crimes constituting the pattern.

* * *

“Because MCL 777.43(2)(a) states that the sentencing offense ‘shall’ be included in the five-year period, the sentencing offense *must* be included in the five-year period. Therefore, MCL 777.43(2)(a) does preclude consideration of a five-year period that does not include the sentencing offense.” *Francisco, supra* at ____.

Part VI—Fashioning an Appropriate Sentence

8.30 Additional Information to Consider Before Imposing Sentence

B. Improper Considerations

Insert the following text after the third bullet on page 146:

Resentencing is required when a sentencing court indicates that the sentencing process “might go a whole lot easier” if the defendant produced the weapon involved in the offense when, although the jury convicted the defendant of felony-firearm, the defendant maintained his innocence of the weapons charge. *People v Conley*, ____ Mich App ____, ____ (2006).

In *Conley*, the defendant admitted to much of the conduct involved in his convictions for first-degree home invasion and felonious assault but he consistently denied that he possessed a weapon at the time of the offenses. At the defendant’s sentencing hearing the trial court invited the defendant to further incriminate himself:

“The trial court did not expressly state that if [the defendant] provided the location of the gun he would receive a lesser sentence. However, the offer of such a quid-pro-quo clearly existed. The trial court stated, ‘[the defendant] may wish to appeal the conviction, but it might go a whole lot easier if we had the weapon that was discussed in this matter.’ Clearly, the implication from this was that [the defendant] would have been sentenced more leniently if he informed the trial court of the gun’s location and thereby effectively admitted his guilt.” *Conley, supra* at ____.

Part IX—Sentence Departures

8.51 Exceptions: When a Departure Is Not a Departure

Delete the second paragraph of the November 2005 update to page 209 and insert the following text:

By peremptory order dated March 10, 2006, the Michigan Supreme Court vacated the Court of Appeals opinion in *People v Buehler (On Remand)*, 268 Mich App 475 (2005). *People v Buehler*, ___ Mich ___ (2006). The Supreme Court remanded the case to the Court of Appeals to consider two questions:

“(1) whether the circuit court provided substantial and compelling reasons for imposing a sentence that the circuit court acknowledged was a departure from the guidelines, . . . and (2) whether any term of imprisonment that may be imposed by the circuit court is controlled by the legislative sentencing guidelines or by the indeterminate sentence prescribed by MCL 750.335a.”

Part X—Selected Post-Sentencing Issues

8.52 Appellate Review of Felony Sentences

A. Invalid Sentences

Insert the following text after the first bulleted paragraph at the top of page 211:

*See the April 2006 update to page 146 for more information about this case.

Where a trial court implies that it might impose a more lenient sentence if the defendant provided the court with information that required the defendant to effectively admit his guilt, the court “violated [the defendant’s] constitutional right against self-incrimination” and the sentence is invalid. *People v Conley*, ___ Mich App ___, ___ (2006).*

The statutory mandate of MCL 769.34(10)—a minimum sentence within the appropriate guidelines range must be affirmed on appeal unless it was based on inaccurate information or a scoring error—does not override the relief due a defendant for a “sentencing error of constitutional magnitude.” According to the *Conley* Court:

“It is axiomatic that a statutory provision, such as MCL 769.34(10), cannot authorize action in violation of the federal or state constitutions.” *Conley, supra* at ___.

Part X—Selected Post-Sentencing Issues

8.52 Appellate Review of Felony Sentences

B. Correcting Invalid Sentences

Insert the following text after the first paragraph near the bottom of page 212:

The requirement that a trial court articulate the reasons for imposing a sentence may be satisfied by the court's explicit or implicit indication that it relied on the sentencing guidelines in fashioning the sentence imposed. *People v Conley*, ___ Mich App ___, ___ (2006).

Part X—Selected Post-Sentencing Issues

8.52 Appellate Review of Felony Sentences

C. No Remedy Available, Permitted, or Necessary

Insert the following text after the first full paragraph near the top of page 214:

Note: However, a defendant must be resentenced when the initial sentence is based on a cell range resulting from a scoring error, even if the court's initial sentence falls within the cell range indicated after the error is corrected. *People v Francisco*, ___ Mich ___, ___ (2006).

Part X—Selected Post-Sentencing Issues

8.52 Appellate Review of Felony Sentences

D. Sentences Imposed Under the Statutory Guidelines

1. Sentences Within the Guidelines Range

Insert the following text after the first paragraph in this sub-subsection on page 215:

See e.g., *People v Conley*, ___ Mich App ___, ___ (2006). Where a sentencing court implies it would be more lenient if the defendant provided the weapon used in the offense even though the defendant has consistently maintained his innocence with regard to weapon use, the court violates the defendant's constitutional right against self-incrimination—an error that overrides the legislative mandate in MCL 769.34(10).

See also *People v Francisco*, ___ Mich ___, ___ (2006). A defendant must be resentenced when his or her sentence is derived from a cell range resulting from a scoring error, even when the sentence imposed is within the cell range indicated after the error is corrected.